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IN THE

SUPREME COURT OF THE UNITED STATES

Appealed from the Supreme Court of Alabama.

OCTOBER TERM, 1947

No. 741

GEORGE D. FINLEY, et als.,
Appellants.

v.

THE CITY OF TARRANT CITY,
a Municipal Corporation, et als.,
Appellees.

PETITION FOR RE-HEARING

TO THE HONORABLES, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Come the appellants, George D. Finley, Hattie Finley, Alta Finley and Frances Finley and, complaining that error has intervened in the decision of the Court, respectfully apply for a re-hearing in the above-styled cause, and pray that the certificate, order, or mandate of dismissal of the appeal therein be re-called and stayed pending re-hearing of said cause; and in support of said petition for re-hearing appellants submit the following:

BRIEF AND ARGUMENT

The order entered on May 3, 1948, by this Honorable Court is in the following language:

> "PER CURIAM: The motion to dismiss is granted and the appeal is dismissed for the reason that the judgment of the court below is based upon a non-federal ground adequate to support it. Mr. Justice Black took no part in the consideration or decision of this case".

This Honorable Court evidently did not have before it sufficient of the pleadings,—the substitute bill and the amendment thereto—in the *jurisdictional statement* filed along with the brief of the appellants. The main contention of appellants is *that* relative to their rights as to Jackson Boulevard and said "Alley" which the City confiscated from appellants.

Now, let us examine the opinion rendered in said cause by the Supreme Court of Alabama with reference to said Jackson Boulevard and said "Alley". Said opinion is officially reported as *Finley, et als., v. Tarrant City,* ..... Ala., ..., 32 So. 2d, 806. In discussing certain excerpts from said opinion it is pertinent first to consider certain paragraphs of said Substitute Bill and the amendment thereto relating to said Jackson Boulevard and said "Alley". (It might be well to state that the reason for filing the substitute bill was for the purpose of incorporating into one *paper,* so to speak, the Original Bill filed August 12, 1935, and the Amendments thereto; and in open Court, when appellants confessed the demurrer of respondents to the last amendment to the *original bill,*

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counsel for appellants with the approval ot the Court, agreed to and did file, said substitute bill June 14, 1941 (Tr. 56), with the following exhibits, among others, in aid thereof and as a part thereof: Exhibit A, containing a description of said assessments, among which was a description of the land taken by said City to form said "alley" October 2, 1923; and appellants sued for said land taken to form said "alley" in paragraph 2, of said Substitute Bill (Tr. 38), which paragraph reads, in part, as follows: "2. Complainants are the only surviving children and the only heirs of Mrs. N. J. Finley, who died in August 1932, and who for thirty years or more prior to and at her death was the owner of and in actual peaceable possession of the real estate described in Exhibit A hereto annexed and made a part thereof as if fully set out herein * * *" (See Exhibit E, page 44 of the printed "Statement as to Jurisdiction" where said land forming said "alley" is described as S-1, under the sewer Ordinance.

Now there had been no lapse of twenty (20) years between October 2, 1923 when said land to form said "alley" was taken by said City, and June 14, 1941, when said Substitute Bill was filed. "The acquisition of a public road by *prescription* requires twenty (20) years of uninterrupted use by the public."—*Beverly v. State,* 28 Ala. App. 451, 185 So. 768; *Sharp v. State,* 25 Ala. App. 173, 142 So. 683; *Dickson v. Dickson,* 247 Ala. 330, 24 So. 2d 419.

It is therefore, very clear, that the claim of appellants to said land forming said "alley" was NOT lost to them by prescription.

Appellants could disregard the amendment filed to

the substitute bill and still recover said "alley" under said substitute bill. The amendment merely attempted to more clearly state said claim. (See par. L., TR. 71, and Par. 2 of prayer, Tr. 75). It may also be noted that said land taken by said City to form said "alley" was sued for by appellants in their original bill, paragraph 2 thereof, which reads practically the same as paragraph 2 of the substitute bill (Tr. 1). (See also par. 2, Tr. 38, in substitute bill). To the said original bill, par. 2 (Tr. 1) Exhibit A was attached thereto and made a part thereof, which Exhibit described said land, 15 ft. wide and 366 ft. long, taken to form said "alley". Said exhibit was detached therefrom when the Substitute Bill was filed, and was attached to said Substitute Bill. We also find the following allegation in the original bill filed August 12, 1935: "Pr. 12. Complainants further aver that said municipality is attempting to confiscate said property of complainants without due process of law." (Tr. 5). Also, we find in the prayer of said original bill the following language: "Complainants pray for such other, further, general or special relief as in equity they are entitled to and in duty bound will every pray". The same prayer is in substitute bill.

"Where the original complaint was NOT barred by the statute of limitatio, a proper amendment to the original complaint, made AFTER the period of limitations for the actions alleged in the amendment related back to the original complaint and was NOT barred by the statute."—*Townes v. Dallas Mfg. Co.*, 154 Ala. 612, 45 So. 696, and cases cited therein. "Amendment to bills may be filed as a MATTER OF RIGHT at any time before final decree, by striking out or adding new parties, or to meet ANY STATE OF EVIDENCE which will

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authorize relief; * * * (Equity Rule 28(d), Ala. Code for 1940) (1923 Code, Ala., 6558). (Note, Cited: "An amendment to bill in equity does NOT depart from purpose of original bill if it seeks to adjudicate property rights in same property between same parties as result of same transaction, though presenting different version of facts and calling for application of different legal principles and moulding of relief in different form."—*King v. McAnnally,* 234, Ala., 479, 175 So. 546, and cases cited therein.

Therefore, appellants respectfully insist that under the decision rendered in this cause by the Supreme Court of Alabama they have been deprived of their said property taken by said City to form said "alley" without due process of law in violation of Section 1 of the 14th amendment to the Constitution of the United States, unless said decision is modified or reversed. Appellants further insist that they are entitled to reasonable compensation for said land taken to form said "alley", with interest thereon, under the same principle that the Supreme Court of Alabama held (in effect) that appellants were entitled to recover reasonable compensation for land taken by said City to form Elm Avenue. (See *Finley, et als v. Tarrant City, et als.,* ....Ala....., 32 So. 2d 806; *Jones v. New Orleans, etc. R Co.,* 70 Ala., 227; *Thornton v. S.&B. R. Co.,* 84 Ala. 109, 4 So. 197; *City of Birmingham v. Ala. H.B. &L. Assn.,* 231 Ala. 558, 165 So. 187; *City of Birmingham v. Smyer,* 230 Ala., 234, 160 So. 764.

II.

Let us now consider Jackson Boulevard. The claim, or rights of appellants regarding this street may be ascertained by *correct answers* to the following questions: (1)

Did the right of way of the Birmingham Electric Co. (30 ft. by 877 ft.) through appellant's property, or any portion thereof, REVERT to appellant's estate, when it conveyed same to said City of Tarrant in September, 1929? (a) If not, then, DID said City have the LEGAL right, in view of and in the face of the statute, Code Ala., 1940, Tit. 37, Section 528, (Code 1923, Ala., Sec. 2189), to grade, pave or improve said right of way for said Birmingham Electric Co., at said City's expense? Said statute reads, in pertinent part, as follows: *"Assessments as against street car or railroad tracks,'*—If there be a street, electric, or other railroad track or tracks on any street or highway improved or re-improved under this article, *the cost of such improvement,* except storm water and sanitary sewers, between the tracks and rails of the tracks * * * *shall be paid by the owner of such railroad,* and shall be *assessed against* and *form a lien on said railroad,* and the property connected therewith * * *." (Note: *Ala. Traction Co. v. Selma Trust Co.,* 213 Ala. 269, 104 So. 517; *Same case,* 217 Ala., 653, 117 So. 19; *Ala. City v. Ala. P. Co.,* 213 Ala. 644, 106 So. 39; *Day v. Montgomery,* 207 Ala., 644, 93 So. 609; *Mobile v. Mobile, etc. R. Co.,* 226 Ala., 693, 147 So. 606; *Birmingham v. Seaboard, etc. R. Co.,* 227 Ala., 77, 148 So. 425.

In its opinion in this case, the Supreme Court of Alabama held that the Birmingham Electric Co. did not abandon its said right of way (See opinion 32 So. 2d, at page 809; or page 52 of "Statement as to Jurisdiction"). Then, it logically follows that if said right of way was NOT abandoned by said Birmingham Electric Co., and same did not revert to appellants estate, the said Birmingham Electric Co. STILL OWNS SAID RIGHT OF WAY, and under the said above statute of Alabama,

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and the decisions of the Supreme Court of Alabama construing said statute, the said Birmingham Electric Co. was due to pay for said improvement made by said City on its said right of way, and the cost of the said improvement thereof (which was in the sum of $5,000.00 or more) was illegally charged in and added to the assessments of appellant's property, making an UNEVEN, ARBITRARY, DISCRIMINATORY AND ADDED BURDEN ON APPELLANTS, the effect of which was the taking of appellant's property without due process of law, and in plain violation of Section 1 of the 14th amendment to the Constitution of the United States, and which was a denial to appellants of the EQUAL PROTECTION OF THE LAW. (*K.C. So. R. Co. v. Road Improvement, etc.,* 256 U.S. 658, 65 L. Ed. 1151, 41 S. Ct. 604; *Milheim v. Moffatt, etc.,* 262 U.S. 17, 67 L. Ed. 1194, 43 S. Ct. 694. THERE IS NO ESCAPE FROM THIS LOGIC.

Now let us examine the pleadings as to said *illegal items* (relocating said street car track, and improving said right of way for said Birmingham Electric Co.), and adding same to appellant's assessments. We find in the original bill filed August 12, 1935, par. 6, thereof (Tr. 3) that appellants charged that they had been illegally burdened with the cost thereof, that should, under the said law of Alabama been paid by said Birmingham Electric Co. Also, the same charge was alleged in the Substitute Bill filed June 14, 1941, (par. 15(d), Tr. 46). Let us keep this in mind, that the Substitute Bill was filed for the purpose of INCORPORATING into one compact paper or pleading the original bill and all amendments filed thereto. In the instroduction to the Substitute Bill we find the following language (Tr. 37) : "Now come

the complainants and file the following substitute bill in lieu of the original bill and all of the amendments thereto hereto filed in this cause." Now, in Webster's New Inter. Dict. we find "Substitute" defined as follows: "To put in the place of another person or thing; to exchange." In the same dictionary we find: "In lieu of" defined as' "Instead of". It was more convenient to have the original bill and the amendments made thereto ALL INCORPORATED INTO ONE PAPER OR PLEADING, namely, the substitute bill. It was not intended to abandon any issue raised in the original bill and the amendments thereto by filing the substitute bill. The injunction was asked for in the original bill; it was also prayed for in the substitute bill, and allowed by BOTH the lower state court and also by the Supreme Court of Alabama. (In fact, THE APPELLANTS WERE DRIVEN INTO THE EQUITY COURT FOR AN INJUNCTION TO PREVENT SAID CITY FROM TAKING THEIR SAID PROPERTY UNDER SAID ASSESSMENTS WHEN SAID ASSESSMENTS HAD BEEN APPEALED TO THE CIRCUIT COURT. Pending said suit, appellants discovered, by means of interrogatories to said City and otherwise, that said City had also illegally taken certain of their property for streets and said "alley"). Thus, we see that in both the original and also the substitute bills, said charge as to said illegal item was made.

Now, as to the claim of appeallants to the lands taken TO FORM said Jackson Boulevard we find in the substitute bill the following: (Tr. 38, par. 3) "The lots and parcels of land described under the heading "Ordinance 12" in Exhibit A adjoins the street called by the City Jackson Boulevard but complainants aver that said

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Jackson Boulevard is not a public street or highway but all of it belongs to complainants, except that portion that was conveyed by complainant's mother to the Birmingham Electric Co. for the right of way for its street car line many years prior to the doing of the work above mentioned, as will be hereinafter more specifically set forth." In par. 15 (N) (Tr. 47) we find the following: "The so-called streets designated by the City as Jackson Street and Elm Avenue were never dedicated as public streets as required by the laws of Alabama, and the so-called streets belong to complainants. *In par. F of the amendment to the substitute bill,* appellants attempted to make more definite and certain their claim to *Jackson Boulevard* that was abandoned by Birmingham Electric Co. In par. C of the amendment to the substitute bill, the claim as to Elm Avenue was more definitely stated. The Supreme Court of Alabama in its opinion in this case (32 So. 2d, 806),—see also page 53 of "Statement as to Jurisdiction"), as to Elm Avenue is in the following language: "BUT there is a claim originally made an issue by the substitute bill and its answer and set forth in paragraph C of the amended bill, which should receive our consideration. It is the claim for taking the land in Elm Avenue without just compensation". * * * "(2) The court will determine the right, if any, to compensation and the amount thereof, if any, for the land in Elm Avenue alleged to have been taken without conveyance or condemnation. The decree of the court is accordingly corrected so as to show that the bill, as amended, is also retained as to this aspect."

In the case of *Heard v. Brooklyn,* 60 N.Y. 242, also the case of *Strong v. Brooklyn,* 68 N.Y. 1, the street car company sold a portion of its easement or right of way

to the City of Brooklyn to enlarge the public street, which right of way had been acquired by condemnation proceedings. The court held in each case that said portion sold by said street car company, was abandoned and same REVERTED to the estate of the reversionary owners thereof. (See also *The People v. Lawrence,* 54 Barb. (N.Y.) 589; *Penn v. Platt,* 47 Ohio St. 366, 25 N.E. 1028; *Ala. P. Co. v. Dailey,* 31 Ala., App. 44, 18 So. 2d, 142; 20 C.J. page 1236, Sec. 597). The Dailey case, supra, held that it was a question as to intention as to abandonment, which was a jury question. In 20 C.J., page 1234, Sec. (592) 3. NON-USER. (We quote the following): "An easment acquired by condemnation proceedings may be LOST by NON-USER for an unreasonable length of time. (*French v. Bramtree Mfg. Co.,* 23 Pick. (Mass.) 216; *Gross v. Jones,* 85 Nebr. 77, 122 N.W. 681, L.R.A. (N.S.) 47). In section 593, 20 C.J., page 1234, we quote, in part: "* * * There may be *abandonment of a part of a right of way* without an abandonment of the whole". (Citing cases from: Iowa, Mass., N.Y., Ohio). In section 594, (20 C.J., page 1234) we qrote, in part: "Abandonment is made up of two elements, ACT AND INTENTION". (Citing cases). In section 595, (20 C.J., page 1235) we quote, in part: "* * * there must be both a non-user and an intention to abandon",—Citing cases, *Newton v. Mfg. Co.,* 115 Fed. 781, 53 C.C.A. 599; *Tenn., etc. R. Co. v. Taylor,* 102 Ala., 224, 14 So. 379.

In the instant case, the Birmingham Electric Co., by condemnation proceedings acquired said right of way in 1916 through appellant's lands. Since 1916 to the present time, there has been a NON-USER of all of said right of way, except the Ten (10) feet reserved for its single track railway. There clearly has been an abandonment by

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act—NON-USER. But we find also that there was bandonment by INTENTION also. For in its said deed of conveyance of said twenty (20) feet of said right of way to said City of Tarrant we find said INTENTION clearly expressed thus: "IT BEING THE INTENTION of the parties hereto that this CONVEYANCE shall and DOES hereby grant to the said City of Tarrant City ALL OF THE RIGHT, TITLE, AND INTEREST OF THE BIRMINGHAM ELECTRIC CO. IN AND TO SAID STRIP OF LAND 30 ft. wide used by the Birmingham Electric Co. for a street railway, right of way, etc., * * * reserving the right to operate a SINGLE TRACK railway on said street (Jackson Boulevard), etc.," (Tr. 135), or see page 34 of "Statement as to Jurisdiction"). So, in this case we have the INTENTION plus the ACT. Also, shortly after execution of said deed by said Birmingham Electric Co. and said City, the City paved with CONCRETE PAVEMENT SEVEN (7) INCHES THICK all of said 20 feet abandoned by said Birmingham Electric Co. DOES Non-user of a right of way for 32 years amount to an abandonment thereof? DOES the intention expressed in the DEED of CONVEYANCE MEAN WHAT IT SAYS? DOES the fact that said 20 feet was paved WITH PORTLAND CEMENT CONCRETE PAVEMENT indicate an abandonment? (As to the paving of 7 inches thick, see Tr. 79,—or on page 21 of "Statement as to Jurisdiction"). THERE CERTAINLY COULD NOT BE ANY MORE CONVINCING EVIDENCE OF SUCH ABANDONMENT.

Now, let us consider Ordinance No. 38, adopted in 1929, and see if it IMPAIRS THE OBLIGATIONS OF THE CONTRACT said City made on July 7, 1924,

with Mrs. N. J. Finley, mother and predecessor of appellants in title to said lands. In said contract of July 7th, 1924, as the *consideration* of said right of way for said Jackson Boulevard said City agreed (Tr. 129) or see "Statement as to Jurisdiction", page 24-25), in part: "As a part of the CONSIDERATION HEREOF, it is understood and agreed that the Town (Tarrant City) shall at ITS OWN EXPENSE, AND WITHOUT EXPENSE TO VENDORS (Mrs. N. J. Finley—(in substance) rebuild fences—build retaining wall to protect fine spring on edge of said street—"It is further understood and agreed that said Town shall *grade both sides of said strips of land* (meaning the land forming said Jackson Boulevard—interpolation ours) within a reasonable time, making the same reasonably suitable for the use of the public as a street". The only consideration to be paid said Mrs. N. J. Finley for said strips of land was "the relocating fences," "build a retaining wall" and "GRADING" said two strips of land for a street thereby making Mrs. Finley's adjacent lots salable as lots on which to build. None of which was done until 1930, when same was GRADED AND PAVED and all of the cost thereof (INCLUDING THE SAID GRADING) was assessed against said property of Mrs. Finley in violation of the said obligations of said contract of July 7, 1924.

Now, let us see what part of said Ordinance No. 38, adopted by said City in 1929, and AFTER and SUBJECT to the said contract of July 7, 1924) IMPAIRS THE OBLIGATIONS OF SAID CONTRACT OF July 7th, 1924. In Section 3 of said Ordinance No. 38, we quote the following: "That the cost of constructing said improvements S H A L L B E A S S E S S E D AGAINST THE PROPERTY ABUTTING ON

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THE PORTIONS OF THE HIGHWAY SO IMPROVED." (Tr. 89), or see page 22 of "Statement of Judisdiction). Pursuant to said Ordinance said City assessed the GRADIING and all other costs of said improvements against said property of appellants, IN PLAIN VIOLATION OF SECTION 10, of ARTICLE 1 of the Constitution of the United States. (See: *Northern Ohio T. & L. Co. v. State of Ohio,* 38 S. Ct. 196, 245 U.S. 574, 62 L. Ed. 481; *Rees v. City of Watertown,* 86 U.S. 107, 19 Wall. 107, 22 L. Ed. 72).

"Local practice will *never be allowed* to defeat a plain assertion of a Federal right".—*Davis v. Wechsler,* 263 U.S. 22, 68 L. Ed. 143, 44 S. Ct. 13. "The law of the United States CANNOT BE EVADED by the FORMS OF LOCAL PRACTICE."—*Rogers v. Alabama,* 192 U.S. 226, 48 L. Ed. 417, 24 S. Ct. 257; *Ward v. Love County,* 253 U.S. 21, 64 L. Ed. 758, 40 S. Ct. 418. "When matters nominally of procedure are actually matters of substance, which AFFECT A FEDERAL RIGHT the decision of the State Court is subject to review."—*Centr. Ves. R. Co. v. White,* 238 U.S. 507, 59, L. Ed. 1433, 35 S. Ct. 865; *New Orleans, etc. Railroad Co. v. Harris,* 247 U.S. 367, 62 L. Ed. 1167, 38 S. Ct. 535; *Seaboard, etc. R. Co. v. Renn,* 241 U.S. 290, 60 L. Ed. 1006, 36 S. Ct. 567. "Whether the State Court has denied to appellants rights asserted UNDER LOCAL LAW the protection which the Constitution guarantees, IS A QUESTION upon which the petitioners *are entitled to invoke* the judgment of this Court. Even though the Constitutional protection invoked be denied on NON-FEDERAL GROUNDS it is the province of this Court TO INQUIRE WHETHER THE DECISION RESTS upon a fair or substantial basis."—*Broad River Power*

Co. v. S. C. ex rel., Daniel, 281 U.S. 537, 74 L. Ed. 1023; *Fox River Paper Co. v. R.R. Co.,* 274 U.S. 651, 71 L. Ed. 1279, 47 S. Ct. 669, and cases cited.

In its opinion in this case (32 So. 2d, 806) the Supreme Court of Alabama NEVER COMMENTED ON AND NEVER PASSED ON the question raised by appellants in their pleadings and in their assignments of error as to whether or not Ordinance No. 38, which provided for improvements on Jackson Boulevard, adopted in September, 1929, IMPAIRED THE OBLIGATIONS OF THE CONTRACT made July 7, 1924, by said City and Mrs. N. J. Finley. "United States Supreme Court will TAKE JURISDICTION WHERE NON-FEDERAL GROUND was NOT CONSIDERED BY STATE COURT".—*Grayson v. Harris,* 45 S. Ct. 317, 267 U.S. 352, 69 L. Ed. 652, reversing Harris v. Grayson, 216 P. 446, 90 Okl. 147.

In the substitute bill (par. 15 (m) Tr. 47) we find the following language: "(m) Said proceedings for the construction of said so-called improvements (of said streets, Jackson and Elm Avenue) IMPAIRED THE OBLIGATION OF THE CONTRACT BETWEEN THE CITY AND COMPLAINANT'S MOTHER, in VIOLATION OF THE CONSTITUTION OF ALABAMA AND OF THE UNITED STATES". In par. 9 of the PROTEST filed with said City before said assessments were made final on Sept. 23, 1930, we find the following: "9. For that said laws and ordinances and assessments made thereunder violate the Constitution of Alabama and also the Constitution of the United States". (Tr. 55). The Protest was attached to and made an Exhibit to the Substitute Bill in aid thereof. Also in par. 15 (j) (Tr. 47) of the Substitute Bill we find

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the following language: "The Ordinances under which said so-called improvements were constructed and said assessments were levied are in violation of the 5th and 14th amendments to the Constitution of the United States in that the City has taken complainant's property WITHOUT DUE PROCESS OF LAW AND WITHOUT JUST COMPENSATION". It is to be remembered that the Court overruled the demurrer of respondents (appellees) to the SUBSTITUTE BILL and there WAS NO APPEAL THEREFROM.

It is earnestly insisted that since the Supreme Court of Alabama DID NOT pass on said question as to WHETHER OR NOT ORDINANCE No. 38 IMPAIRED THE OBLIGATIONS OF SAID CONTRACT OF July 7, 1924, which was in said PLEADINGS AND ALSO IN SAID ASSIGNMENT OF ERRORS, and was argued in Brief of appellants, this Honorable Court should grant jurisdiction in this case, under the ruling in the case of *Grayson v. Harris,* supra, decided by this Court in 1925.

It is also earnestly insisted that when the pleadings are carefully ANALYZED as we have attempted to do herein, it will be seen that the Supreme Court of Alabama erred in its decision as to said "Alley" and as to said Jackson Boulevard, and that under its ruling as to Elm Avenue in said case (32 So. 2d, 806), appellants are also entitled to RECEIVE REASONABLE COMPENSATION for said "alley" and also for said Jackson Boulevard. It might be stated that said briefs of both parties to this suit were submitted to the Supreme Court of Alabama WITHOUT ORAL ARGUMENT.

We respectfully direct the Courts attention to our original brief on file in this cause, and to the discussion of

the above enumerated points in our briefs, and submit that the order of dismissal of said appeal should be vacated and the mandate stayed; a re-hearing granted, the cause heard on the merits, and the judgment of the Supreme Court of Alabama be modified or reversed.

Respectfully submitted,

GEO. D. FINLEY,
Counsel for Appellants, Petitioners.

CERTIFICATE UNDER RULE 33, as amended.

I, George D. Finley, Counsel of Record for the appellants and petitioners in the above-styled cause, hereby certify that this petition for re-hearing is presented in good faith and not for delay.

GEO. D. FINLEY,
Counsel for Appellants.

CERTIFICATE OF SERVICE

I, the undersigned counsel for appellants, hereby certify that I have on the date herein designated, served a copy of the foregoing Petition for Re-Hearing and Brief and Argument, on Graham, Bibb, Wingo & Foster, counsel for Appellees. This 13th day of May, 1948.

GEO. D. FINLEY,
Counsel for Appellants.

Service of a copy of the foregoing Petition for Rehearing and Brief and Argument is hereby accepted, this 13th day of May, 1948.

DOUGLASS P. WINGO,
Counsel for Appellees.
By Dorothy Bowie